

This Opinion is Not a
Precedent of the TTAB

Mailed: August 31, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Tequila Cuervo, S.A. de C.V.
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Serial No. 90741831
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Julianne Abelman and Erica R. Halstead of Womble Bond Dickinson (US) LLP,
for Tequila Cuervo, S.A. de C.V.

William Verhosek, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.
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Before Cataldo, Greenbaum and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Tequila Cuervo, S.A. de C.V. (“Applicant”) seeks registration on the Principal Register of the standard character mark 100 PUNTOS for “[n]on-alcoholic cocktail mixes” in International Class 32, and “[a]lcoholic beverages except beer; alcoholic cocktail mixes; distilled blue agave liquor” in International Class 33.¹

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to

¹ Application Serial No. 90741831 was filed on May 28, 2021 under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

the goods identified in the Application, so resembles the mark 100 POINTS, registered on the Principal Register for “[d]rinking glasses, decanters” in International Class 21,² as to be likely to cause confusion, mistake or deception. The Examining Attorney also refused registration under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on ground that Applicant’s proposed mark merely describes a feature or quality of Applicant’s identified goods. The Examining Attorney further refused registration pursuant to Trademark Rule 2.61(b), 37 C.F.R. §2.61(b), due to Applicant’s failure to provide required information (pertaining to the descriptiveness refusal) reasonably necessary to the examination of the Application.

After the Trademark Examining Attorney made the refusals final, Applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. We affirm the refusal to register on the ground of likelihood of confusion. Because we affirm the Trademark Act Section 2(d) refusal, we need not analyze the descriptiveness refusal under Trademark Section 2(e)(1) nor Applicant’s non-compliance with the information requirement under Trademark Rule 2.61(b).³ *In re Suuberg*, 2021 USPQ2d 1209, at *9 (TTAB 2021).

² Registration No. 4366603 was issued on July 16, 2013; renewed.

³ Because we need not consider Applicant’s non-compliance with the information requirement, the Examining Attorney’s objection to Applicant’s untimely attempt to respond thereto in its Appeal Brief is moot. *See* Applicant’s Brief, 4 TTABVUE 22; Examining Attorney’s Brief, 6 TTABVUE 2.

Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

I. Likelihood of Confusion: Applicable Law and Analysis

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont*” factors) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record bearing on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We have considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source,

and to protect registrants from damage caused by registration of marks and goods or services that are likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Strength of Registrant's Mark

Before we evaluate the similarity or dissimilarity of Applicant's and Registrant's marks, we first consider the strength of Registrant's 100 POINTS mark. Since the strength of Registrant's mark affects the scope of protection to which it is entitled, *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *20 (TTAB 2022), we thus consider the conceptual strength of Registrant's mark based on the nature of the mark itself, and we consider its commercial strength based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength....").

Because the cited registration is "prima facie evidence of the validity of the registered mark," *see* Trademark Act Section 7(b), 15 U.S.C. § 1057(b), as to conceptual strength, we must assume that the 100 POINTS mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). *See New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020); *see also Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). Thus, we afford Registrant's 100 POINTS mark "the normal scope of protection to

which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017).

In an effort to weaken the scope of protection for Registrant’s 100 POINTS mark, Applicant argues “the state of the [Trademark] Register is ... probative evidence to show that the term ‘POINTS’ [in Registrant’s mark] is relatively weak when used in connection with alcoholic beverages.”⁴ In support of this argument, Applicant points us to the following active, use-based, trademark registrations:⁵

Mark	Reg. No.	Goods
	6229495	Wines
5 POINTS	3437194	Wine
NINE POINTS	3295447	Wine
FOUR POINTS	932362	Wine, namely, wine sold only in LIDL retail stores, including bricks and mortar and online stores

The sixth *DuPont* factor allows Applicant to contract the scope of protection for Opposer’s mark by adducing evidence of “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. Generally, “evidence of third-party registrations is relevant to show the sense in which a mark is used in

⁴ Applicant’s Brief, 4 TTABVUE 15.

⁵ Applicant’s Brief, 4 TTABVUE 14; Office Action Response of April 11, 2022, at 34-47. We afford no weight to pending Application Serial Nos. 90448855 (mark: 99 POINTS), 90448852 (mark: 98 POINTS), 90448851 (mark: 97 POINTS), or abandoned Application Serial No. 88249107 (mark: 101 POINTS) that Applicant also made of record. Office Action Response of April 11, 2022, at 25-33. Pending applications are evidence only that the applications were filed. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009). Similarly, abandoned applications have “no probative value other than as evidence that the application[s] [were] filed.” *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018).

ordinary parlance, ... that is, some segment that is common to both parties' marks may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak." *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (cleaned up). "[T]hird-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services." *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017).

Here, Applicant's third-party registration evidence demonstrates that the term "POINTS" has some suggestive significance in connection with alcoholic beverages, particularly wines. This evidence does not however, show that Registrant's 100 POINTS mark as a whole is weak, or that the term "POINTS" has any readily understood significance in connection with drinking glasses or decanters, the goods for which the 100 POINTS mark is registered.

As to commercial strength, in an ex parte appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, "in an ex parte appeal the 'fame of the mark' factor is normally treated as neutral because the record generally includes no evidence as to fame." *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016). Conversely, "[e]vidence of third-party use of

similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)). However, Applicant did not make of record any evidence of third-party uses of similar marks on similar goods. Thus, because there is no evidence of record regarding the fame or commercial weakness of the cited mark, the fifth *DuPont* factor is neutral.

In sum, Registrant’s 100 POINTS mark is inherently distinctive, with some degree of suggestiveness in connection with alcoholic beverages. The commercial strength of Registrant’s mark is a neutral factor in our analysis.

B. The Similarity or Dissimilarity of the Marks

We now consider the similarity or dissimilarity of Registrant’s and Applicant’s marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar[.]” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019), “but does not **necessarily** do so.” *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958) (emphasis original). In this connection, by “commercial impression” we mean “what the probable impact will be on the ordinary purchaser in the market place” *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 458 F.2d 1403, 173 USPQ 690, 691 (CCPA 1972). The

Examining Attorney argues that 100 POINTS and 100 PUNTOS are legally identical. Applicant challenges the analysis and reasoning as to how the Examining Attorney came to this conclusion.⁶

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *In re i.am.symbolic*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks omitted)). The focus is on the recollection of the average purchaser — here a potential consumer of drinking glasses, decanters, alcoholic beverages except beers, alcoholic cocktail mixes, distilled blue agave liquor (i.e., tequila) and/or non-alcoholic cocktail mixes — who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975); see also *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison”) (cleaned up; citation omitted).

So long as we “analyze[] the marks as a whole[, i]t is not improper for the Board to determine that, ‘for rational reasons,’ ... [we] give ‘more or less weight ... to a particular feature of the mark[s]’ provided that ... [our] ultimate conclusion regarding

⁶ Examining Attorney’s Brief, 6 TTABVUE 5-6; Applicant’s Brief, 4 TTABVUE 4-7.

... likelihood of confusion ‘rests on [a] consideration of the marks in their entireties.’” *Quiktrip W., Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 2021 USPQ2d 35, at *2-3 (Fed. Cir. 2021) (quoting *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) and *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).

We begin with the palpable observation that the identical first term of both Registrant’s mark and Applicant’s mark is the number “100.” As the first term, “100” typically would be considered the dominant element due to its relative prominence (in word order) as to the commercial impression created in each mark. *Palm Bay Imps.*, 73 USPQ2d at 1693. But this is not universally true. Rather, we find that the term “100” would not be perceived as the dominant element of either mark because “100” functions as an adjective, modifying the nouns “POINTS” and “PUNTOS” respectively. *See, Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (affirming Board’s finding that the noun LION was the dominant part of the applicant’s mark STONE LION CAPITAL).

This brings us to a comparison of the terms “POINTS” versus “PUNTOS” (within the context of comparing the marks 100 POINTS and 100 PUNTOS as a whole), which the Examining Attorney argues are legally identical under the doctrine of foreign equivalents.⁷ In support of the Office’s position, the Examining Attorney made of

⁷ Examining Attorney’s Brief, 6 TTABVUE 5.

record the Spanish-to-English translation of the Spanish term “PUNTOS,” the plural of “PUNTO,” as meaning “PERIODS” or “POINTS” in English.⁸

Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine the similarity of connotation with English word marks. *See Palm Bay Imps.*, 73 USPQ2d at 1696. The doctrine is applied when it is likely that “the ordinary American purchaser would ‘stop and translate [the word] into its English equivalent.’” *Id.* (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)); *see also In re Aquamar, Inc.*, 115 USPQ2d 1122, 1127 (TTAB 2015); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006). “When it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied.” *Palm Bay Imps.*, 73 USPQ2d at 1696.

We have consistently found that Spanish is a “common language” in the United States, and we have routinely applied the doctrine of foreign equivalents to Spanish-language marks. *See, e.g., In re Aquamar*, 115 USPQ2d at 1127; *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1648 (TTAB 2008) (“there is no question that Spanish is a common, modern language”); *In re Perez*, 21 USPQ2d 1075, 1076 (TTAB 1991); *In re Am. Safety Razor Co.*, 2 USPQ2d 1459, 1460 (TTAB 1987).

“[T]he ‘ordinary American purchaser’ in a case involving a foreign language mark refers to the ordinary American purchaser who is knowledgeable in English as well

⁸ Spanish-to-English translation of “PUNTOS” from spanishdict.com, Office Action of October 12, 2021, at 10-15.

as the pertinent foreign language.” *In re La Peregrina*, 86 USPQ2d at 1647-48 (citing *In re Thomas*, 79 USPQ2d 1021, 1025 (TTAB 2006)). Here, as in *In re Aquamar*, we take judicial notice of the August 2022 United States Census Bureau’s LANGUAGE USE IN THE UNITED STATES: 2019 report, which indicates that, after English, Spanish is the most commonly spoken language at home in the United States, and that over 61% of the United States population speaks Spanish at home.⁹

The Examining Attorney argues that the doctrine of foreign equivalents applies here, such that ordinary American purchasers would readily translate 100 PUNTOS from Spanish to its English equivalent, 100 POINTS, so as to come to a conclusion of the marks’ similarity in meaning and commercial impression.¹⁰ Applicant acknowledges that its mark “includes a foreign word” and that “its mark and the [c]ited [m]ark have some common elements,”¹¹ but concedes no further. Challenging the Examining Attorney’s application of the doctrine of foreign equivalents, Applicant argues that American consumers will not translate 100 PUNTOS to 100 POINTS, but rather take Applicant’s mark as it is, citing to *In re Tia Maria, Inc.*, 188 USPQ 524, 525-26 (TTAB 1975) and *In re Taverna Izakaya LLC*, 2021 USPQ2d 1134, at *6-12 (TTAB 2021). Both of these decisions, however, are distinguishable.

⁹ LANGUAGE USE IN THE UNITED STATES: 2019 report, <https://www.census.gov/content/dam/Census/library/publications/2022/acs/acs-50-pdf> (last visited August 29, 2023). The Board may take judicial notice of census data. *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *7 (TTAB 2019); *Blackhorse v. Pro-Football, Inc.*, 111 USPQ2d 1080, 1098 n.114 (TTAB 2014), *aff’d*, 112 F.Supp.3d 439, 115 USPQ2d 1524 (E.D. Va. 2015), *vacated on other grounds and remanded*, *Pro Football, Inc. v. Blackhorse*, 709 F. App’x 183 (per curiam) (4th Cir. 2018) (mem.).

¹⁰ Examining Attorney’s Brief, 6 TTABVUE 6.

¹¹ Applicant’s Brief, 4 TTABVUE 5, 9.

In *In re Tia Maria*, the Board reversed the examining attorney's refusal to register the mark TIA MARIA (translated from Spanish in the application to mean "AUNT MARY") for restaurant services on the ground of likelihood of confusion with the registered mark AUNT MARY'S for canned fruits and vegetables, stating:

It is recognized that "AUNT MARY" is the English equivalent of "TIA MARIA", and that there are decisions which hold that no distinction for trademark purposes can be drawn between a foreign word and its English equivalent. But, nevertheless there are foreign expressions that even those familiar with the language will not translate, accepting the term as it is, and situations arise in the marketplace which make it unfeasible or even unlikely that purchasers will translate the brand names or labels appearing on canned foods and other like products. ... That is, insofar as this reasoning applies to the instant case, it is unlikely to expect that a person encountering "AUNT MARY'S" canned fruits and vegetables in a supermarket or other establishment where goods of this type are customarily sold would translate "AUNT MARY'S" into "TIA MARIA", and then go one step further and associate these food products with applicant's restaurant. Likewise, going the other route, it is difficult to perceive that a person who had purchased "AUNT MARY'S" canned fruits and vegetables on the shelves of a supermarket would, upon dining at the "TIA MARIA" restaurant in Mexican decor and surrounded by a menu of Mexican delicacies, translate "TIA MARIA" into "AUNT MARY" and then mistakenly assume that the "TIA MARIA" restaurant and "AUNT MARY'S" canned fruits and vegetables originate from or are sponsored by the same entity.

In re Tia Maria, 188 USPQ at 525-26.

The circumstances described in *In re Tia Maria* are not present in this appeal. As noted above, the Board found that the doctrine of foreign equivalents was inapplicable, and that there was no likelihood of confusion, based upon the circumstances surrounding the appearance of the respective marks at the point-of-sale, as well as the disparate channels of trade in which the marks travelled.

Here, there is nothing in the record distinguishing the marks at the point-of-sale¹² and, as we discuss below, the evidence shows that the respective products of Registrant and Applicant can be and are sold together, in overlapping if not identical trade channels.

In *In re Taverna Izakaya*, the applicant sought registration of the mark TAVERNA COSTERA for restaurant, café, and bar services. 2021 USPQ2d 1134, at *1-2. The examining attorney refused registration on the ground that the mark, translated in English to COASTAL TAVERN, was merely descriptive of the applicant's identified services. *Id.* at *2. The applicant and examining attorney agreed that COSTERA was a Spanish word for COASTAL, *Id.* at *2 and *7, but based on the evidence of record the Board found it appropriate to treat TAVERNA as an English word. *Id.* at *9. Concluding, the Board stated:

Because the evidence of record does not support a finding that consumers would stop and translate the two different-language words comprising the TAVERNA COSTERA mark and instead would perceive the mark as it is, we decline to apply the doctrine of foreign equivalents. The mark as a whole is not descriptive and at most it suggests, through the use of this particular combination of words from multiple languages, a “fusion” of cuisines.

Id. at *11.

¹² In any event, both Applicant's mark and Registrant's mark are depicted in standard characters in the Application and Registration at issue, with “no claim ... made to any particular font style, size or color.” Trademark Rule 2.52(a)(1), 37 C.F.R. § 2.52(a)(1). Thus, at the point-of-sale, the respective marks could appear in identical form. See *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018) (literal elements of standard character marks may be presented in any font style, size or color).

Applicant argues that the reasoning of *In re Taverna Izakaya* applies so as to preclude the application of the doctrine of foreign equivalents to the present appeal, stating:

[T]he Board’s rationale in *Taverna* is applicable herein. Specifically, Applicant notes that its mark similarly consists of a combination of elements from different languages, and thus, consumers will not be likely to stop and translate the mark. For one, the first portion of Applicant’s mark, namely the number 100, is understood in English and thus, will be perceived as an English element. It will be not be perceived by consumers to be a “foreign element,” regardless if the number is also understood by Spanish speaking individuals. Additionally, the second term, namely PUNTOS, is pronounceable in English. When these two factors are considered together, it is unlikely that consumers would stop and translate Applicant’s mark.¹³

We disagree. The first identical term in Applicant’s and Registrant’s marks is depicted as the numerical designation “100,” not “one-hundred” or its Spanish equivalent, “cien.”¹⁴ Thus, to a Spanish speaking consumer in the United States, 100 PUNTOS would be read wholly in Spanish as “cien puntos” and translated as a whole into English as 100 POINTS. Applicant’s argument that “PUNTOS is pronounceable in English” is meritless. Under the doctrine of foreign equivalents, it is the meaning of the foreign term “PUNTOS” to the Spanish-speaking U.S. consumer that counts, not whether the foreign term is “pronounceable” in English.

We therefore find that, under the doctrine of foreign equivalents, the ordinary U.S. consumer purchaser who is knowledgeable in English as well as Spanish would stop

¹³ Applicant’s Brief, 4 TTABVUE 7.

¹⁴ Translation of “one-hundred” to its Spanish equivalent “cien” from CAMBRIDGE DICTIONARY (<https://dictionary.cambridge.org/dictionary/english-spanish/hundred?q=one-hundred>, last viewed August 29, 2023). See *In re La Peregrina*, 86 USPQ2d at 1647 n.3 (judicial notice taken of definition in CASSELL’S SPANISH-ENGLISH ENGLISH-SPANISH DICTIONARY).

and translate 100 PUNTOS into its English equivalent, 100 POINTS. Thus, Applicant's mark and Registrant's mark have the same meaning and similar overall commercial impression. As we noted above, Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar'") (citations omitted)).

For completeness, the appearance and sound of "100" in both marks is identical; "POINTS" appears and sounds similar to "PUNTOS" in that both words begin with the letter "P," end with the letter "S", and share the middle letters "N-T." Overall, 100 POINTS and 100 PUNTOS appear and sound more similar than they are different.

In sum, the notable similarities between Registrant's 100 POINTS mark and Applicant's 100 PUNTOS mark, compared in their entireties under the first *DuPont* factor, weigh in favor of a finding that confusion is likely.

C. The Similarity or Dissimilarity of Registrant's Goods vs. Applicant's Goods

We now turn to the comparison of the goods at issue, the second *DuPont* factor. In making our determination regarding the similarity of the goods, we must look to how they are identified in the Application and Registration. *See Stone Lion*, 110 USPQ2d at 1162 (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("[T]he question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth

in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods”).

Further, “the goods ... of the parties need not be similar or competitive, or even offered through the same channels of trade to support a holding of likelihood of confusion.” *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, 109 USPQ2d 1347, 1356 (TTAB 2014). “It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer [or other source].” *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Moreover, with respect to likelihood of confusion, the issue is not whether consumers will confuse the products, but rather whether they will confuse the source of those goods. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (the similarity or dissimilarity and nature of the goods “considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the source or origin of the goods and services.’”) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62

USPQ2d 1001, 1004 (Fed. Cir. 2002) (citing *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)).

To recap, Registrant's identified goods are "drinking glasses, decanters"; Applicant's identified goods are "alcoholic beverages except beers, alcoholic cocktail mixes, distilled blue agave liquor (i.e., tequila)," and "non-alcoholic cocktail mixes."

In support of the Office's argument that Registrant's and Applicant's products are related, the Examining Attorney made of record examples of spirits and liquor companies, including Applicant, who advertise for sale (on their own websites or on third-party websites) their alcoholic beverage products as part of combination gift sets that include drinking glasses and/or decanters in them. The brands of these companies who engage in this practice include Jose Cuervo, Tequila Patron, 1800 Silver, Johnnie Walker, Crown Royal, Casa Dragones, Casamingos, Hornitos, Cazadores, and Hijos de Villa.¹⁵ The Examining Attorney also made of record a Milagaro Tequila & Mixer Gift set advertised for sale at the website oldtowntequila.com, and a Rick and Morty Drink Mix and Mini Glass Gift Set advertised for sale at the website thoughtfully.com.¹⁶

The Examining Attorney additionally made of record an October 2021 online article titled "Best tequila gift set" at the BAR & WINE BEST REVIEWS website

¹⁵ Alcoholic beverage gift set examples, Office Action of October 12, 2021, at 16-27; Office Action of June 24, 2022, at 25-47.

¹⁶ Milagro Tequila & Mixer Gift Set, and Rick and Morty Drink Mix and Mini Glass Gift Set, Office Action of June 24, 2022, at 60-68.

(kdvr.com).¹⁷ The article begins by stating, “[t]equila sets make for terrific gifts, offering those who like the drink to enjoy the taste and look to its fullest. ... Tequila gift sets vary greatly in content, so it’s important to know what’s available and find the right set for your needs.” The article continues by informing the reader of the various items available in tequila gift sets, including: shot glasses, decanters and glassware, mixers, cocktail sets (shaker, jigger, strainer and muddler) and serving trays. Specifically regarding mixers, the article states:

Some sets may feature mixers to make fun and exciting tequila-based cocktails. These are ideal for those who don’t have much bartending experience or who don’t want to spend much time and effort collecting ingredients and preparing the drink. Most mixes focus on making margaritas, but a variety of flavor syrups are available for different preferences.

At the end of the article, the author reviewed a number of tequila gift sets that were available for sale at the time the article was written, with links to websites where the gift sets could be purchased.

Collectively, the Examining Attorney’s evidence demonstrates that Applicant’s and Registrant’s goods not only can be and are sold together (including by Applicant), but also that they are intended to be used together in a complementary fashion by consumers. The complementary nature of the respective goods supports the argument that they are related. *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (“The extent to which particular food products are

¹⁷ “Best tequila gift set” article, Office Action of June 24, 2022, at 48-59.

deemed related will depend on the facts of each individual case. In the instant case, we take notice that the products ‘bread’ and ‘cheese’ are often used in combination. Such complementary use has long been recognized as a relevant consideration in determining a likelihood of confusion.”); *see also In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014) (“Pepper sauce and agave sweeteners are ... commonly used together, and conjoint use is a fact proper to be considered along with other facts present in particular cases.”) (cleaned up).

In response to the Examining Attorney’s evidence, Applicant argues:

While Applicant acknowledges the Examiner’s evidence that liquor companies will occasionally sell their beverages in conjunction with drinking glasses, this fact alone does not equate to a likelihood of confusion between the marks. Glassware and decanters are sold by numerous companies, vendors, stores and websites. In the vast majority of instances, consumers would not go to a seller of alcoholic or non-alcoholic beverages for the purpose of purchasing drinkware.¹⁸

We accept Applicant’s concession that liquor companies sell their beverages in conjunction with drinkware, but the remainder of Applicant’s argument quoted above is unaccompanied by any proof. “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

We find that the respective goods are complementary, related, and thus similar under the second *DuPont* factor, therefore weighing in favor of a finding that confusion is likely.

¹⁸ Applicant’s Brief, 4 TTABVUE 11.

D. Similarity or Dissimilarity of the Respective Trade Channels, Purchasing Conditions and Consumer Sophistication

The third *DuPont* factor assesses the similarity or dissimilarity of the parties' established, likely-to-continue trade channels. *DuPont*, 177 USPQ at 567. Under the fourth *DuPont* factor, we consider "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *Id.* We observe there are no trade channel or class-of-consumer restrictions in the cited Registration or the Application now on appeal.

Because there are no limitations as to channels of trade or target purchasers in the cited Registration or the Application, it is presumed that the respective goods would move in all normal channels of trade, and that they are available to all usual purchasers for these goods. *See Citigroup*, 98 USPQ2d at 1261 (Fed. Cir. 2011); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); *Paula Payne Prods.*, 177 USPQ at 77. The Examining Attorney's evidence discussed above relating to the similarity of the respective goods also demonstrates that these goods are sold together in overlapping if not identical trade channels. Applicant did not make of record any evidence to the contrary.

Similarly, because Registrant's identified goods in its registration, and Applicant's identified goods in its Application, do not include any restrictions or limitations as to channels of trade or classes of consumers, the prospective purchasers for the parties' identified goods include a variety of consumers, including consumers that do not have significant knowledge or experience with the purchase or use of the respective goods. *See Stone Lion*, 110 USPQ2d at 1163-64 (recognizing Board precedent requiring

consideration of the “least sophisticated consumer in the class”); *In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that all purchasers of wine may not be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

Applicant argues that “consumers purchasing alcoholic beverages, including distilled blue agave liquor, are likely to spend a fair amount of time in making the decision to purchase. Such goods can be costly, and thus, are not made on impulse. Moreover, many consumers are partial to certain brands of alcoholic beverages, and thus know the brand they choose to purchase.”¹⁹ Once again, Applicant’s argument is unaccompanied by any proof, and “[a]ttorney argument is no substitute for evidence.” *Cai*, 127 USPQ2d at 1799. Moreover, “even if we were to assume that purchasers of ... [Applicant’s goods] are discriminating, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as the present one involving ... [notably similar] marks and related goods.” *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1413 (TTAB 2015), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

We find the third *DuPont* factor, trade channels, weighs in favor of a finding that confusion is likely. Due to a lack of evidence, we further find that the fourth *DuPont* factor, purchasing conditions and consumer sophistication, is neutral.

¹⁹ Applicant’s Brief, 4 TTABVUE 11.

E. Other Considerations

The “thirteenth [*DuPont*] factor (*i.e.*, any other established fact probative of the effect of use) ‘accommodates the need for flexibility in assessing each unique set of facts.’” *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 (TTAB 2017) (quoting, in part, *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012)). This factor considers “fact[s] [that] may well play an important, and perhaps pivotal, role in the likelihood of confusion analysis.” *Id.*

Under the thirteenth *DuPont* factor, Applicant brings to our attention its following abandoned trademark applications:²⁰

Mark	Appln. Serial No.	Status	Goods
100 PUNTOS	77299658 (the “658 Application”)	Filed: October 9, 2007 (on intent-to-use basis) Abandoned: December 5, 2011 (failure to file statement of use)	Non-alcoholic cocktail mixes, Cl. 32; Alcoholic beverages except beer; alcoholic cocktail mixes; tequila, Cl. 33.
100 PUNTOS	85466544 (the “554 Application”)	Filed: November 7, 2011 (on intent-to-use basis) Abandoned: October 26, 2015 (failure to file statement of use)	Non-alcoholic cocktail mixes, Cl. 32; Alcoholic beverages except beer; alcoholic cocktail mixes; tequila, Cl. 33.

²⁰ TSDR records for Applicant’s abandoned applications, Office Action Response of April 11, 2022, at 15-23.

Mark	Appln. Serial No.	Status	Goods
100 PUNTOS	87717746 (the “746 Application”)	Filed: December 12, 2017 (on intent-to-use basis) Abandoned: July 19, 2021 (failure to file statement of use)	Non-alcoholic cocktail mixes, Cl. 32; Alcoholic beverages except beer; alcoholic cocktail mixes; tequila, Cl. 33.

Applicant endeavors to juxtapose these historical and procedural facts with those of the cited registration:

Mark	Registration No.	Status	Goods
100 POINTS	4366603	Appln. Filed: November 22, 2012 Reg. Issued: July 16, 2013	Drinking glasses, decanters, Cl. 21.

Based on these facts, Applicant observes that its '554 Application was filed prior to the underlying application for the cited 100 POINTS Registration. However, Registrant's underlying application did not encounter a likelihood of confusion refusal based upon Applicant's prior filed '554 Application. Further, Applicant's '746 Application was filed after the issue date of the cited 100 POINTS Registration, but the '746 Application did not encounter a likelihood of confusion refusal based upon the 100 POINTS Registration. Applicant also notes that Registrant failed to oppose Applicant's '746 Application. Applicant therefore argues that the USPTO on two prior occasions, as well as the owner of the 100 POINTS Registration, have concluded that

there is no likelihood of confusion between the respective marks and their associated goods.²¹

Applicant's argument under the thirteenth *DuPont* factor lacks merit for a number of reasons. To begin, Applicant did not make of record the underlying application files for its abandoned applications. All we have are the TSDR records, which tell us that each Application was allowed, but that each was abandoned due to Applicant's failure to file statements of use. We do not have the communications exchanged between Applicant and the USPTO, which might have been more illuminating.

Further, as we already noted concerning the abandoned third-party application that Applicant sought to make of record, abandoned applications (even those owned by Applicant) have "no probative value other than as evidence that the application[s] [were] filed." *Kemi Organics*, 126 USPQ2d at 1606. Additionally, "[n]either the Board nor any Trademark Examining Attorney is bound by decisions of Examining Attorneys to register prior marks. To the contrary, the USPTO must decide each application on its own merits, and decisions regarding other [applications or] registrations do not bind either the [USPTO] or [the reviewing tribunal]." *In re USA Warriors*, 122 USPQ2d at 1793 n.10 (TTAB 2017). Each case is decided on its own facts, and each mark stands on its own merits. *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (citing *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009)).

²¹ Applicant's Brief, 4 TTABVUE 16-18.

We therefore find the thirteenth *DuPont* factor, as argued by Applicant on this appeal, to be a neutral factor in our analysis.

F. Conclusion on Likelihood of Confusion

Weighing the *DuPont* factors for which there has been evidence and argument in this appeal, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023) (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”), Registrant’s 100 POINTS mark is inherently distinctive, with some degree of suggestiveness in connection with alcoholic beverages; the commercial strength of Registrant’s mark is a neutral factor. Registrant’s 100 POINTS mark and Applicant’s 100 PUNTOS mark are notably similar when compared in their entireties under the first *DuPont* factor. This weighs in favor of a finding that confusion is likely.

The goods of Applicant and Registrant are complementary, in that they can be used together. These goods also can be and have been sold together in gift sets. The goods are therefore not only related (and therefore similar), but they also travel in overlapping if not identical trade channels. There is no evidence of record regarding the sophistication of the consumers or the purchasing conditions that would indicate a heightened or a lower degree of consumer care. This factor, therefore, is neutral. The existence of Applicant’s three prior (and abandoned) applications to register the 100 PUNTOS mark, relative to the time that the underlying application for the 100 POINTS mark was filed, and the time of the issuance of the 100 POINTS registration, also is a neutral factor.

Balancing and weighing the *DuPont* factors for which there has been evidence and argument, we find that confusion is likely between Applicant's 100 PUNTOS mark and goods, and Registrant's 100 POINTS mark and goods.

Decision:

The refusal to register Applicant's 100 PUNTOS mark pursuant to Trademark Act Section 2(d) is affirmed as to both identified classes of goods in the Application.